SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 178

DANIEL PATTON KRAMER,
Petitioner,

v.

THE STATE OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT
IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE and ASSOCIATE JUSTICES of the UNITED STATES SUPREME COURT:

The state of Washington contends that pursuant to Rule 19 § 1 of the Revised Rules of the Supreme Court of the United States that a Writ of Certiorari should not be issued as a matter of sound judicial discretion.

First, the hired appeal counsel has cast many asperations upon the conduct of the juvenile and insanity proceedings that were present in this case. He did not

properly present the record of these matters to the State Supreme Court or the United States Supreme Court. Although there was a period of fourteen months from the filing of the notice of appeal to the State Supreme Court and the filing of his brief to the State Supreme Court, the only reason stated to the State Supreme Court was that "Counsel has not yet had opportunity to fully know what transpired . . .[1] There is not even an attempt at a showing of cause, good or bad, sufficient or insufficient, as to why counsel has not presented a record of what transpired. The case is presented here as it was to the State Supreme Court on the basis of substantial quantities of inference.

Second, throughout the petition inferences are made in regards to the competence of the appelant's hired trial counsel. Trial counsel had many years experience, was successful in changing venue of the trial to Skagit County to avoid possible community prejudice and was successful in trial in obtaining a lesser included charge of second degree murder in a trial of first degree murder which would carry the possibility of a death

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[1]"Counsel has not yet had opportunity to fully know what transpired in the Snohomish County Juvenile and Insanity hearings and anticipates the need of a hearing on Petition for Writ of Habeas Corpus before full knowledge can be gained of all matters effecting the rights of the Appellant. We believe, however, that on the record the Court should remand for a hearing de novo on the question of insanity and juvenile jurisdiction to determine whether Appellant's charge should be dismissed or he be granted a new trial which will guarantee his legal rights under the direction of an opinion of this Court." (Br. 16)

"There should be a remand back to the Superior Court to determine the juvenile and/or insanity case rights or a retrial where essential defenses will be asserted, as soon as possible, or an out and out dismissal." (Br. 43)

sentence. Disagreement between appeal counsel and at least partially successful trial counsel as to strategy does not support an inference of incompetence of trial counsel.

I

THE SNOHOMISH COUNTY SUPERIOR COURT IN JUVENILE COURT AND MENTAL ILLNESS COMMITMENT PROCEDURES DID NOT DEPRIVE APPELANT OF HIS RIGHTS, PRIVILEGES AND IMMUNITIES UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The county officials of Snohomish County and the Superior Court of that county fully complied with all the procedural "due process" safeguards guaranteed appellant when he was committed to a state mental institution pursuant to RCW 71.02.130 and when he was tried as an adult upon his release from that hospital. Such guarantees are fully cognizant when the following facts relating to the petitioner's case are closely analyzed.

The petitioner killed a police officer on Saturday, February 5, 1966. He was taken into custody soon after the shooting and was at that time and several times thereafter fully advised of his rights (HC 113 through 128). The petitioner admitted being so advised (St. 549, 554, 555).

An attorney was hired by the petitioner who performed various acts for him within the first twenty-

four hours, which was on Sunday (St. 411, 412, 419, 494).

Soon after the petitioner was taken into custody it became apparent that he was seriously considering taking his life. A psychiatrist, Dr. Buchmeier, was called in on the day of the crime to examine the petitioner. Due to the petitioner's condition, he was admitted to a state mental institution, Northern State Hospital, on the evening of Sunday, February 6, 1966 (St. 417, 418) for observation and treatment on an emergency basis.

On February 8, 1966, the Prosecuting Attorney for Snohomish County, with the assent of petitioner's trial counsel, signed an application for the involuntary commitment of the petitioner to a state mental institution.[2] Pursuant to this application, an involuntary commitment hearing was held on February 9, 1966. The petitioner's counsel, his sister and his mother had notice of this hearing. Following this hearing, an order was entered on the same date (Sup. Tr. p. 3) ordering the petitioner to be hospitalized at a state hospital for observation as a mentally ill person under RCW 71.02. Petitioner was hospitalized with the cooperation of his privately retained counsel. No objection was made by his counsel and no appeal was taken by his counsel. Appellant's present counsel, through the clear perspective of hindsight, is suggesting a procedure which if the opinion of a highly qualified psychiatrist, Dr. Buchmeier, was correct, would have

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[2]Washington Law, RCW 71.02.090, requires that the prosecuting attorney sign all such applications.

resulted in the death of the defendant prior to trial. The doctor's opinion was that at the time of his examination after the shooting and its effects had been grasped by the appellant that had a serious, immediate suicidal potential. Petitioner's counsel's procedure would have avoided all constitutional arguments other than his right to be alive to stand trial. All of the above is not of record before this Court; if there is doubt as to the accuracy of these statements, this Court is strongly urged to remand for fact finding on this issue to the trial court.

At the entry of this order, the petitioner was in the jurisdiction of the superintendents of one of the state mental institutions, namely, Northern State Hospital.[3] Thus, in accord with Washington Law, the Snohomish County authorities and the Superior Court of that county had relinquished control over the petitioner to the superintendent of Northern State Hospital until it was deemed by that superintendent that he was sufficiently mentally competent to return to the community. The superintendent of Northern State Hospital did release the petitioner from that hospital on April 1, 1966 (Tr. 6).

In light of the above superior court order adjudging that the petitioner be placed in a state mental institution, the respondent asks: What juvenile court hearing or supervision could have been applied while the peti-

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[3]It should be noted that RCW 71.02.240 specified that:

"Where a person is found to be mentally ill the court shall

"(1) Order a person hospitalized at a state hospital until released by the superintendent thereof; or . . ."

tioner was at Northern State Hospital? Furthermore, in light of the defendant's mental condition between the time he killed Officer Arndt and the time of his release from Northern State Hospital, what better way could this situation be handled?

When the petitioner was released from Northern State Hospital by its superintendent, he was then eighteen years old. Washington law provides that the jurisdiction of the juvenile court only applies to persons under the age of eighteen (RCW 13.04.010). At this time an order was entered in Snohomish County Juvenile Court on April 4, 1966, dismissing Cause No. 8376 due to the child having become eighteen years of age (Tr. p. 10). Such an order was in full accord with the present Washington law which provides that:

> "When a juvenile cause is pending and not heard on its merits prior to the time the juvenile reaches 18 years of age, the juvenile court loses jurisdiction over the cause. *State v. Ring*, 54 Wn. 2d 250, 339 P.2d 461 (1959); see also *In Re Lesperance*, 72 W.D. 2d 567, 434 P.2d 602 (1967); *In Re Dillenburg v. Maxwell*, 70 W.D. 2d 325, 422 P.2d 783 (1967)"
>
> (72 W.D. 2d 892, 435 P.2d 970 (1968).)

In light of such order, the adult courts of Snohomish County had jurisdiction to try this action.

Since there is no statement in the United States Constitution or by this Court as to the age a person may be subjected to an adult proceeding rather than to a juvenile one, it would appear that state law would be applicable as to this determination. The procedure

followed in the present case was approved by the Washington State Supreme Court in its decision of this case. Thus, there is no federal question involved.

In the adult proceeding brought against the petitioner, all of the requirements set forth in *In Re Gault*, 387 U.S. 1 (1967) — notice of charges, right to counsel, confrontation, cross-examination, privilege against self-incrimination and right to appeal — were met. Unless the question of which court in a state must assure the rights enunciated by *Gault* reaches constitutional dimensions or unless the question of the cut-off point between adult and juvenile court reaches constitutional dimensions, it is difficult to discover an issue in petitioner's allegation of impropriety in the juvenile proceedings which is justicable on this point.

II

SNOHOMISH COUNTY AUTHORITIES DID NOT DEPRIVE PETITIONER OF RIGHT, PRIVILEGE AND IMMUNITY IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDMENTS FIFTH, SIXTH AND FOURTEENTH WHEN A WRITTEN STATEMENT TAKEN FROM HIM WAS USED IN AN ADULT MURDER TRIAL.

The respondent maintains that the petitioner's rights, privileges and immunity were not violated under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution when certain written statements taken from him were used in an adult murder trial for the following three reasons:

A. THE TRIAL COURT WAS NOT GIVEN AN OPPORTUNITY TO RULE UPON THE CONSTITUTIONALITY OF THE ADMISSION OF THE STATEMENTS

No objection or exception or motion to strike was taken at the time of trial to the rebuttal testimony. (See St., beginning at p. 560 through end of rebuttal testimony, except to object to the within statement as not properly identified (St. 579).) Objections or exceptions to the trial of a case, particularly as to constitutional grounds, must be taken at the trial court to become subject to review before the Supreme Court.

> "We (the Supreme Court) shall not consider questions not properly submitted to the trial court, for that court must be given a chance to view and correct the claimed error before the matter can be reviewed by us." *State v. Johnson*, 69 Wn. 2d 264, 273 (October 7, 1966). See also *State v. Miller*, 66 Wn. 2d 535, 403 P.2d 884 (1965).

B. THE TRIAL COURT ADMITTED THESE STATEMENTS INTO EVIDENCE ONLY AFTER THE PETITIONER TESTIFIED THAT HE HAD SIGNED A STATEMENT THAT THE SHOOTING HAD BEEN ACCIDENTAL

The respondent maintains that the following language by the Washington Supreme Court in its decision of this case, 72 W.D. 2d 892, 435 P.2d 970 (1968), clearly sets forth the procedure followed in the admission of the petitioner's statements and the validity of this procedure:

". . . At the pretrial hearing on June 1, 1966, the trial court found that the statements made by appellant to the officers were voluntary and were made after appellant had been advised of and had understood his constitutional rights. The trial court at that time, applying the rule of *Harling v. United States, supra,* held the confession was not admissible in this adult criminal proceeding because the written statement was taken by the officers while the juvenile proceeding was pending and the accused was subject to the jurisdiction of the juvenile court.

". . .

"When the appellant bceame a witness in his own behalf in the adult trial, on direct examination, he testified to the fact that he had signed a statement that the shooting had been accidental . . .

"On cross-examination the prosecuting attorney questioned appellant as to other relevant statements in the written document, some of which the appellant denied were contained therein. The written statement was admitted into evidence and read to the jury (without objection). Appellant contends that the rule announced in *Harling, supra,* forbids its use for all purposes. We do not agree. It was held in *Harling* that a statement taken by the officers from a juvenile while juvenile proceedings were pending, could not be introduced into evidence in the prosecution's case in chief in an adult criminal proceeding after the juvenile court had relinquished its jurisdiction thereto. The rationale of the opinion was predicated upon principles of fundamental fairness which operate to make such statements inadmissible in a later adult proceeding. The court said in the *Harling* case, *supra,* at 163:

> " 'It would offend these principles to allow admissions made by the child in the non-criminal and non-punitive setting of juvenile proceedings to be used later for the purpose of

securing his criminal conviction and punishment. Such a practice would be tantamount to a breach of faith with the child, since he cannot be charged with knowledge of either his privilege against self-incrimination or the Juvenile Court's power to waive its jurisdiction and subject him to criminal penalties. (Footnote omitted.)'

"In *Riddick v. United States*, 326 F. 2d 650, 652 (D.C. Cir. 1963), the same United States Court of Appeals for the District of Columbia, interpreting its *Harling* decision as it related to a circumstance similar to the one at bar said:

" 'We are asked to reverse this conviction because of the prejudice to appellant resulting from the admission of appellant's conversation with the police officer at the time of arrest. But it was the defense who first sought to get these conversations into evidence . . .

" 'In *Harling* we recognized that there are limitations upon the use by the prosecution of admissions obtained from a juvenile by interrogation during police detention prior to waiver of jurisdiction by the Juvenile Court. But we do not read *Harling*, even if it be applicable to the circumstances here involved, as prohibiting the defense from using, or inviting the use, of conversations with the police, which it believes may be helpful in establishing innocence. If its expectations in this regard are not realized, that is surely no ground for reversing the personally disappointing result of conviction.'

"In the case at bar, as in *Riddick, supra*, at 652, it was the appellant 'who first sought to get these conversations into evidence . . . (so as to) give credence to appellant's defense.' The *Riddick* rationale is also the rule in this jurisdiction . . ."

Furthermore, this court in *Walter v. United States*,

347 U.S. 62 (1954), stated that:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths." (347 U.S. at 65.)

Finally, the respondent maintains that it is even questionable as to whether the rule in *Harling v. United States*, 295 F.2d 161 (USCA D.C. 1961) is still valid authority for excluding the use of a juvenile's statements in the prosecution's case in chief. If the *Harling* case was based on the "non-criminal philosophy" of juvenile courts and the *Gault* case, *supra*, can be said to establish due process requirements and procedural safeguards into juvenile proceedings, the strict insulation doctrine of the *Harling* case is in essence overruled by the United States Supreme Court conclusion in the *Gault* case. This viewpoint appears to be in accord with the President's Commission on Law Enforcement and Administration of Justice in their report, The Challenge of Crime in a Free Society, U.S. Government Printing Office, Washington, D.C. (1967), in which the following is stated with regard to those offenders for whom more vigorous measures seem necessary:

> ". . . the adjudacatory hearing should be consistent with basic principles of due process. Counsel and evidentiary restrictions are among the essential elements of fundamental fairness in juvenile as well as adult criminal courts." (Page 81.)

Thus, in the area of a major crime, the respondents maintain that the same rules of admissibility of evidence and statements should be observed as in any other criminal cause.

C. PETITIONER PROVIDED ALL RIGHTS GUARANTEED HIM IN THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AT THE TIME HE MADE THESE STATEMENTS.

The petitioner apparently concedes in petitioner's brief, page 5, that many statements were made to him regarding his rights — his right against incriminating himself, his right to be represented by counsel, that any statements made could be used against him. In regard to the lack of advice that the Court would appoint counsel for the defendant, it should be noted that even though it was a weekend (non-judicial day), counsel was hired and did perform various acts for the defendant within the first twenty-four hours (St. 411, 412, 419, 494). Thus, it is quite apparent that the petitioner was accorded all of his constitutional rights even though certain written statements were taken from the petitioner at a time prior to this court's rulings in *Miranda v. Arizona*, 384 U.S. 436 (1966). In fact, the trial in the present case commenced on June 6, 1966, which was seven days before the *Miranda* decision was handed down.

Furthermore, the trial court's finding on the confession shows that he could have his parents present, but he made no request to use the phone. (HC 116).

There is no record of the defendant asking for counsel, his family, his sister, or anyone else. In fact, his sister, Linda True, did not attempt to see the defendant until three hours after the petitioner's statement was made (HC 88) and his mother was out of town in San Diego, California, at that time.

Finally, at the pretrial hearing on June 1, 1966, the trial court found that the statements made by the petitioner to the officers were voluntary as a matter of fact (HC 121). The trial court was clearly cognizant of the fact that a Snohomish County Sheriff's Officer wrote the statement himself, and this fact was explained to the jury. The petitioner makes no showing that the fact affected the voluntariness of the statement. Surely a statement signed by the defendant is not rendered involuntary because it is not in the defendant's own handwriting.

Although all of the statements in the present case were made by the petitioner prior to this Court's decision of *In Re Gault, supra*, the Snohomish County authorities appear to have more than adequately complied with the spirit and language of that decision.

III

THE PETITIONER WAS NEITHER PREJUDICED WHEN HIS MOTION TO DISMISS A JUROR FOR CAUSE WAS DENIED BY THE TRIAL JUDGE BECAUSE TRIAL COUNSEL HAD NOT EXERCISED ALL HIS PEREMPTORY CHALLENGES WHEN HE ACCEPTED THE JURY AS IMPANELED, NOR WAS HE DEPRIVED OF HIS RIGHTS,

PRIVILEGES OR IMMUNITIES IN VIOLATION OF THE UNITED STATES CONSTITUTION AMENDMENTS FIFTH, SIXTH AND FOURTEENTH.

At the outset, it should be pointed out that the petitioner's trial counsel used his third peremptory challenge against the juror specified on page 15 of the petitioner's brief (St. 6A, 97). It should be further noted that the defense trial counsel did not exercise his last, that is, the twelfth and last, peremptory challenge (6A-144). The petitioner's trial counsel also accepted an alternate juror who was later put on *voir dire* and no peremptory challenge was used by the defense counsel (6A-149). Thus, the respondent maintains that the total jury in this case was without bias and prejudice. Although the juror in question on *voir dire* did state that, "I feel since he was charged with the crime he must have done it," this lack of bias and prejudice on the part of even this juror is pointed out by the trial court when it asked this juror the following questions:

> "And, the question Mr. Hale wants to know, is will you follow that legal — that part of our legal system that a man at the beginning of the trial is presumed to be innocent and that that presumption of innocence continues with him until the state has produced evidence to prove him guilty beyond a reasonable doubt, do you understand that?" (6A-36)

To this question the juror answered, "Yes, I will." Thus, it is quite apparent that the juror did understand the rule that one charged with a crime is presumed to be innocent until the state proves him guilty beyond a reasonable doubt and this rule was brought home to the other jurors.

The Washington rule clearly is that denial of a motion to dismiss a juror for cause is not prejudicial if all the complaining party's peremptory challenges were not exhausted in the course of the jury selection.[4]

The same rule has been set forth in other jurisdictions. See *Mellinger v. Prudential Ins. Co.*, 322 Mich. 596, 34 NW 2d 450 (1945); *United States v. Chapman*, 158 F.2d at 417 (10th Cir. 1947).

[4]In *State v. Thorp*, 42 Wn. 2d 494, 259 P.2d 482 (1953), the Court stated the following with regard to the need for trial counsel to use all his peremptory challenges before he can claim error for the trial court's retention of a juror:

". . . He must show the use of all of his peremptory challenges or he can show no prejudice arising from the selection and retention of a particular juror to try the cause, and is barred from any claim of error in this regard." (42 Wn. 2d at 500, 256 P. 2d at 486.)

The Washington Court set forth this same rule in *Rich v. Campbell*, 164 Wash. 393, 2 P. 2d 886 (1931) and *State v. Muller*, 114 Wash. 660, 195 Pac. 1047 (1921).

CONCLUSION

The state contends that the records show that appellant had a fundamentally fair trial; that no reason or cause is shown for the lack of a complete record in regard to the juvenile and insanity hearings is shown by appellant, and that as a matter of sound judicial discussion, certiorari should be denied in this case.

Respectfully submitted,

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